Supreme Court, U.S.
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NO. 94-1737

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

K.R.B.,
Petitioner,

v.

JAY C. STEPHENSON, COBB COUNTY, PHILLIP SEGRIST, HARVEY PASCHAL, BILL COOPER, EMMETT BURTON, and STAN WISE, individually and in their official capacities,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the decision of the Georgia Court of Appeals where petitioner has failed to properly seek review in the Georgia Supreme Court?

2. Whether this Court has jurisdiction to review questions of state law decided by the Georgia courts?

3. Was the decision of the Georgia Court of Appeals consistent with the precedent of this Court, including Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), and Siegert v. Gilley, 500 U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

LIST OF THE PARTIES

The petitioner here and plaintiff below is Kenneth Ray Brewer (identified by initials "K.R.B." in some of his pleadings).

The respondents here and defendants below include Jay C. Stephenson (the clerk of Cobb County Superior Court) and Cobb County (a political subdivision of the State of Georgia). The remaining individuals listed as respondents were the Commissioners of Cobb County, Georgia, at the time of the filing of the original action. Of these five individuals (Phillip Segrist, Harvey Paschal, Bill Cooper, Emmett Burton and Stan Wise), only Mr. Cooper is presently a member of the Commission.

As required by this Court's Rule 29.1, Respondents notify this Court that there are no parent or subsidiary corporations to be listed.

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TO THE HONORABLE SUPREME COURT:

Come now Respondents, and respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner K.R.B.

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED BELOW

The ORDER of the Superior Court of Cobb County granting Respondents' motion for summary judgment is unpublished and appears as Appendix C to the Petition for Writ of Certiorari.

The decision of the Georgia Court of Appeals affirming without opinion is published as K.R.B. v. STEPHENSON, 214 Ga.App. XXVI (Case No. A94A1479, decided August 1, 1994, reconsideration denied August 12, 1994). Said decision and denial of reconsideration appear as Appendices D & E, respectively, to the Petition for Writ of Certiorari.

The Supreme Court of Georgia denied certiorari on January 19, 1995 in an unpublished order. Said order appears as Appendix F to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). See Petition for Writ of Certiorari, p. 1. However, Petitioner has failed to comply with the specific requirements of this Court's Rule 14.1(e)(i, ii) requiring statement of the significant procedural dates.

As argued in detail infra, pp. 8-10, Petitioner has failed to invoke this Court's jurisdiction for two reasons:

- Petitioner has failed to seek review by the highest court of the State of Georgia as required by 28 U.S.C. § 1257(a).

- As to the third "Question Presented" in the Petition, see Petition for Writ of Certiorari,

pp. i & 18-21, Petitioner asks this Court to review questions of Georgia law which are beyond this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

The genesis of this case dates to the mid-1970's when the Petitioner, then a high school coach, was arrested on drug and gambling charges. Shortly after his arrest, Petitioner waived indictment and entered into a plea agreement for a probated sentence.

Prior to completing his probation, Petitioner was able to secure an order directing the clerk to "seal the record and indictment." Petition for Writ of Certiorari, p. A-1. The order did not require expungement of any materials or the sealing of the index or minute books of the Court. Interpreting the language of the "sealing" order and passing upon the facts of the case, the trial court found that:

> Judge James L. Bullard's Order of September 17, 1975 [i.e., the "sealing" order], was complied with. The Clerk of Court, at that time, sealed the case file and the indictment.

Petition for Writ of Certiorari, p. C-7. The court found that neither expunging nor sealing the minute books was required.

Approximately fifteen years after this plea, Petitioner was again a high school coach in Georgia. Petitioner was employed by the Clarke County [Georgia] Board of Education. (It is important to

note that the Petitioner had never been an employee of any of the Respondents.)

In 1989, Petitioner was terminated from his employment for cause. Although the Petitioner does not deal with this fact in his Petition, the reason for his termination had nothing to do with his claim against the Respondents. Petitioner was terminated because of his involvement in a grade changing scandal involving a student athlete. The trial court held as follows:

> Plaintiff, a football coach, was implicated in a "grade changing" incident. In light of this controversy, a television reporter and cameraman came to the office of the Clerk of the Cobb Superior Court to investigate Plaintiff.

Petition for Writ of Certiorari, p. C-3.

When the story of the grade changing incident broke, several reporters picked up on old leads about Petitioner's drug and gambling plea in the 1970's. The facts of the plea were known in the community inasmuch as the plea took place in open court and the plea received media coverage at the time it was entered. In fact, over the years, the Petitioner himself had made the facts related to his plea known to various person, including his employer the Clarke County Board of Education.

To compliment media coverage of the grade changing scandal, a television reporter and cameraman viewed the public minute book referring to plaintiff's criminal case. The reporters and the public did not have access to the "record and the indictment" which was the subject of the "sealing" order. It is important to emphasize that the minute book was not ordered to be expunged or sealed.

As part of the media coverage, video tape of the Superior Court's minute book entry referring to Petitioner's criminal case was broadcast. On the video tape, the minute book is clearly and legibly marked "adjudicated **not** guilty" in compliance with Georgia's First Offender Act. Nothing visible on the video indicates that Petitioner was found guilty of any crime.

Respondents did not terminate Petitioner's employment or interfere with any constitutionally protected right. Respondents were never his employer. Instead of the alleged actions of the Respondents causing Petitioner loss, in fact, it was Petitioner's involvement in the grade changing scandal that caused public interest in his prior history, thus leading to the events of this case.

II. PROCEDURAL HISTORY.

This action is one of a series of cases that erupted following Petitioner's termination from employment. After his employment was terminated, the Petitioner filed numerous civil and administrative actions against, inter alia, his former employer, several reporters and media outlets, a governmental licensing board and the present Respondents. Petitioner brought this action against the Respondents in a state forum in 1992, after a previous U.S. District Court action was dismissed on Petitioner's own motion.

While this matter was pending, Respondent Jay C. Stephenson, the Clerk of Superior Court and lead defendant below, was drawn into a discovery dispute in another of the torrent of cases that flowed after

Petitioner's termination. The defendant newspaper in Kenneth Ray Brewer v. Times-Journal, Inc. d/b/a Marietta Daily Journal et al., Cobb Superior Court, Civil Action File No.90-1-8483-07, requested the production of the criminal records which Petitioner claimed in this action to be confidential. As a result of the discovery motions in the Times-Journal case, on April 3, 1991, the Cobb Superior Court formally "unsealed" all of Petitioner's criminal records. The trial court noted in its order that "pursuant to Judge Michael Stoddard's Order of April 3, 1991, plaintiff's record is now open to the public." Petition for Writ of Certiorari, p. C-8. In spite of this defeat, Petitioner continued to combat the release of the Petitioner's criminal records. Petitioner filed a motion for contempt against Respondent Jay C. Stephenson on June 17, 1991 for the release of the records. In an order entered on June 26, 1991, the Cobb Superior Court reaffirmed its decision that the Petitioner's criminal records were all "unsealed" and that they were accessible to all members of the public.

Petitioner's complaint, as amended, sounded under various federal theories (including liability under 42 U.S.C. § 1983) and state theories (including contempt of court). After an adequate opportunity to conduct discovery, the Superior Court of Cobb County granted total summary judgment in favor of Respondents on January 26, 1994. Petitioner then filed a timely appeal to the Georgia Court of Appeals. The Court of Appeals affirmed without opinion on August 1, 1994, and denied Petitioner's motion for reconsideration on August 12, 1994. Petition for Writ of Certiorari, pp. D-1 & E-1.

On September 12, 1994 (the thirty-first day following the denial of Petitioner's motion for reconsideration), Petitioner filed an untimely Notice of Intention to Apply for Certiorari (due within ten {10} days in the Georgia Court of Appeals) and an untimely Petition for Certiorari (due within twenty

(20) days in the Georgia Supreme Court). On January 19, 1995, the Georgia Supreme Court denied Petitioner's request to review this matter. Thereafter, Petitioner filed this present Petition for Writ of Certiorari.

The Georgia Supreme Court did not render a decision on the merits of this matter. Rather, the Georgia Supreme Court denied Petitioner's petition for writ of certiorari (i.e., merely decided not to consider the case on the merits). Since there is no merits decision on this matter in the Georgia Supreme Court, it appears that Petitioner is actually seeking a writ of certiorari to the Georgia Court of Appeals, and Respondents have so noted this fact on the cover of this brief.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied for lack of jurisdiction. The Petitioner has failed to properly seek review in the highest Court in Georgia. Additionally, the Petitioner asks this Court to review questions of state law which have already been determined by the Georgia courts.

The Petition for Writ of Certiorari should be denied because this case presents no issue appropriate for review under this Court's discretionary jurisdiction. The decision below is consistent with this Court's authority. Additionally, the facts below allow no relief under any circumstances.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO INVOKE PROPERLY THIS COURT'S JURISDICTION.

A. Petitioner has failed to seek review by the highest court of the State of Georgia as required by 28 U.S.C. § 1257(a).

In defining this Court's jurisdiction, 28 U.S.C. § 1257(a) provides (in part) that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . ." (emphasis added). In the present case, the Petitioner has failed to seek timely review of this matter in the Georgia Supreme Court. Therefore this matter is outside of the jurisdiction of this court.

The Petitioner failed to follow the mandatory appeal procedures to effect review in the Georgia Supreme Court. The Rules of the Supreme Court of Georgia regarding review by certiorari of Court of Appeals decisions provide as follows:

> **Rule 28. Specific requirements; compliance mandatory.**
>
> Compliance with the requirements of this rule governing petitions for certiorari is mandatory: . . . .
>
> (b) Notice of Intention to apply for certiorari shall be given the clerk of the Court of Appeals within ten (10) days after the order overruling the Motion for Rehearing;
>
> (c) The Petition for Certiorari shall be filed with the Clerk of the Supreme Court within twenty (20) days after the

> order overruling the Motion for Rehearing[.]

Ga.Sup.Ct.R. 28 (emphasis added). The Georgia Court of Appeals denied Petitioner's motion for rehearing on August 12, 1994; however it was not until thirty-one days later, on September 12, 1994, that Petitioner filed an untimely Notice of Intention to Apply for Certiorari (filed 21 days late in the Georgia Court of Appeals) and an untimely Petition for Certiorari (filed 11 days late in the Georgia Supreme Court).

In a series of cases, this Court has held that failure to pursue properly a ruling by the highest court of that State will deprive the U.S. Supreme Court of jurisdiction. In McMaster v. Gould, 276 U.S. 384, 48 S.Ct. 299, 72 L.Ed. 574 (1928), the writ was dismissed for want for jurisdiction. Like the Petitioner in the instant case, the petitioner in McMaster did not properly comply with state law procedure for review in the state's highest court. Even though the highest court of the state declined to review the case in McMaster, the U.S. Supreme Court found itself without jurisdiction because the petitioner failed to comply with the mandatory state law procedure to secure review in the highest state court.

Similarly, in Stratton v. Stratton, 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142 (1915), the petitioner failed to pursue properly a discretionary review by the state supreme court. In dismissing the writ for want of jurisdiction, the U.S. Supreme Court held that the petition "simply invites us to assume jurisdiction by exercising an authority which we have not; that is, by indulging in conjecture as to what would or would not have been the judgment of the supreme court of Ohio if it had been called upon to exert the discretion vested in it by state laws." Id. at 56, 36 S.Ct. at 27. As in Stratton, Petitioner K.R.B.'s failure to comply

with Georgia's mandatory procedural requirements would require this court to "indulg[e] in conjecture as to what would or would not have been the judgment of the supreme court of [Georgia]." Id.

The U.S. Supreme Court has uniformly held that failure to pursue review in the highest court of a state is a jurisdictional bar to review in the U.S. Supreme Court. McMaster, supra; Stratton, supra; see Gotthilf v. Sills, 375 U.S. 79, 84 S.Ct. 187, 11 L.Ed.2d 159 (1963) (failure to seek review in highest state court by certified question procedure); Hammerstein v. Superior Court of California, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135 (1951) (improper reliance on review by writ of prohibition in lieu of appeal). Due to Petitioner K.R.B.'s failure to seek review properly in the Georgia Supreme Court, this Court lacks jurisdiction to consider the matter on its merits. Accordingly, the present Petition must be denied.

B. Petitioner seeks review of state law issues which are outside of this Court's jurisdiction.

In defining this Court's jurisdiction, 28 U.S.C. § 1257(a) provides (in part) that state decisions "may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." In essence, this is a "federal question" requirement. In the present case, many of the arguments raised by the Petitioner are state law issues that have been decided against Petitioner by the state courts below. Petitioner's third question presented for review, see Petition for Writ of Certiorari, pp. i & 18-21, is entirely an issue of state law which is beyond this Court's jurisdiction under 28 U.S.C. § 1257(a).

II. NO SPECIAL AND IMPORTANT REASONS EXIST TO GRANT THE PETITION FOR WRIT OF CERTIORARI, ACCORDINGLY, SAID PETITION SHOULD BE DENIED.

A. Generally.

This Court's Rule 10 provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." In this case, the Petitioner has shown no "special and important reasons" for the grant of her petition. U.S.Sup.Ct.R. 10.1. Petitioner has not shown this Court a conflict between the Circuits and/or state courts of last resort, nor has Petitioner shown "an important question of federal law which has not been, but should be settled by this Court." U.S.Sup.Ct.R. 10.1(b, c).

B. The Petition for Writ of Certiorari should be denied inasmuch as Petitioner has shown no conflict among lower courts.

The essence of Petitioner's claim is that he has a constitutional privacy right in the court-house records of this criminal case for the protection of his reputation. The Petitioner has not noted for the Court the existence of any conflict among the circuits or state courts of last resort.

C. The Petition for Writ of Certiorari should be denied inasmuch as the controlling law has been recently declared by this Court.

1. No constitutional right is at stake in this matter.

The law governing this matter is clear. Petitioner has no constitutional privacy right in the court-house records of this criminal case. This Court rejected a similar claim as follows:

> [Petitioner] claims constitutional protection against the disclosure of the fact of his arrest[. Petitioner claims] that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). Paul controls the Petitioner's privacy claim. See Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (public's interest in maintaining archival records); U.S. Const., Amend. VI (the "public trial" clause of the U.S. Constitution explicitly requires that criminal matters be resolved in public). Paul has never been overruled and in fact, the Court's ruling in Paul has recently been reinvigorated by this Court's decision in Siegert v. Gilley, 500 U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

In Siegert, this Court clearly established that citizens situated like Petitioner have no constitutionally protected interest in reputation. The Respondents did not terminate Petitioner's

employment or otherwise interfere with any constitutionally protected interest. Petitioner's only allegation is that his truthful criminal record information was available in the court-house, thus allegedly injuring his reputation.

In spite of clear authority from this Court in Paul and Siegert, the Petitioner continues to assert that he has a claim under the "stigma plus" theory. See Petition for Writ of Certiorari, p. 14. Although the "stigma plus" theory was never authorized by this Court, the theory developed in some of the Circuit Courts following the decision in Paul. The decision in Siegert sounded the death knell for the "stigma plus" theory. This fact is now being recognized in the lower courts. "In Siegert v. Gilley, [cit.], the Supreme Court confronted and expressly rejected the 'defamation plus stigmatization' theory[.]" Grassinger v. Welty, 818 F.Supp. 862, 870 (W.D.Penn. 1992); see Mahoney v. Kesery, 976 F.2d 1045, 1061 (7th Cir. 1992) (in dicta noting probable reading of Siegert that "no consequences, however, grave resulting from a loss of reputation can make defamation actionable as a constitutional tort"). This Court in Siegert conclusively established that Petitioner's claim simply does not exist.

2. The factual basis renders any recovery by Petitioner impossible.

Even assuming that a federal reputational-privacy right could be constructed out of the state law sources that Petitioner relies on, the underlying state law sources do not create such a right in this case. Petitioner relies on two state law sources to support his claim of constitutional privacy, to wit: Georgia's First Offender Act and the "sealing" order entered in his criminal case.

First, the trial court determined, as a matter of state law interpretation, that the Georgia First Offender Act that applied to Petitioner contained no guarantee of confidentiality. 1968 Ga.Laws 324, codified, as amended, O.C.G.A. § 42-8-60 et seq. Petition for Writ of Certiorari, p. C-2 ("At the time of Plaintiff's arrest and plea . . ., the confidentiality provisions of the First Offender Act were not in effect"). Therefore this statute cannot be used as the basis of a claimed constitutional entitlement to privacy.

Petitioner's second ground is likewise insufficient. The trial court found it was undisputed that the "sealing order" was fully complied with by the Respondents. Petition for Writ of Certiorari, p. C-7.

CONCLUSION

Wherefore for all the above stated reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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